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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED GAS TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT

BRIEF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION

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The respondent, Public Service Commission of the State of New York (New York)[1], opposes the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit filed by the petitioner, Consolidated Gas Transmission Corporation (Consolidated).

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

It is perhaps tautological to suggest the reason for denying the writ is that Consolidated has offered no sound reason for granting the writ. Nevertheless, the Court will search the petition in vain for any adequate basis for this Court to grant plenary review of the decision below. The petition represents

[1] New York was an intervenor supporting the Federal Energy Regulatory Commission (Commission), and was on the brief of respondent before the Fourth Circuit. Pet. App. 2a.

Consolidated's last effort to recover $30 million lost because of the company's failure to follow elementary precepts of contract law. Such a mistake is hardly a special and important reason for the exercise of this Court's discretion. Rule 17.1, Rules of the Supreme Court of the United States.

As attempted justification, Consolidated argues that the Commission "frustrated" implementation of the Natural Gas Policy Act of 1978, 15 U.S.C. §3301 *et seq.* (1982) ("NGPA") and this Court's decision in *Public Service Commission of New York* v. *Mid-Louisiana Gas Co.*, 103 S. Ct. 3024 (1983) ("*Mid-Louisiana*") by refusing to permit Consolidated to recover NGPA pricing for its old pipeline-produced gas during a rate period where it lacked the contractual authority to do so. Petition at 8-9. Yet, as the Fourt Circuit recognized, the Commission allowed Consolidated to collect NGPA prices in other rate cases covering different periods where contractual authority was retained through a specific reservation in the agreement. Pet. App. at 20a. The Commission's disallowance rested upon the absence of any such contractual authority in the settlement in issue, not on any attempt to frustrate national energy policy.

As a variant justification, Consolidated argues that the Commission's "stubborn adherence" to the position rejected in *Mid-Louisiana* warrants "swift review by this Court to restore the aims" of the NGPA and the *Mid-Louisiana* mandate. Pet. at 9. Yet, the record shows the Commission implemented the aims of the Fifth Circuit's *Mid-Louisiana* decision[2] (with which it disagreed) while the matter was still being argued before this Court. Pet. App. at 24a. The Commission allowed Consolidated to collect NGPA pricing only where it had reserved authority to do so, but not where no such authority existed. *Id.* at 29a. This is hardly the stuff of "stubborn adherence" to a contrary position requiring swift (or any) review by this Court.

Finally, even if Consolidated had made a far more compelling showing that the decisions below err, such showing would not present grounds for issuing the writ. The decisions below

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[2] *Mid-Louisiana Gas Co.* v. *Federal Energy Regulatory Commission*, 664 F.2d 530 (1981).

rest upon the interpretation of one rate case settlement agreement from a series of such settlements into which Consolidated entered. The Commission's and Fourth Circuit's interpretation of that agreement involves no question of importance generally applicable to the pipeline industry. Thus even assuming that error had been committed, this Court does not sit to correct errors of law or fact of such parochial interest.

II. THE SETTLEMENT AGREEMENT GOVERNS CONSOLIDATED'S RATE TREATMENT

The issue in this case involves a dispute over the meaning of a settlement agreement between Consolidated, its customers, and the Commission setting Consolidated's rates for the period covered by Docket No. RP80-61. This issue, contrary to Consolidated's claims (Pet. at 10-11), does not conflict with national energy policy. This policy allows recovery of NGPA pricing only where contractual authority exists, not where no such authority can be found.

The issue in this case arises from the institutionalized process of settling proposed rate increases. Consolidated's filing in Docket No. RP80-61, like the vast majority of such proposals, was suspended, within the thirty day statutory period, by Commission order which also made collection of the proposed rates after suspension subject to refund and set a hearing to determine whether the proposed rates were just and reasonable. 15 U.S.C. §717c(a).[3] Subsequent discussions between the parties led to a settlement agreement fixing Consolidated's rates in that docket.

In settlements at the Commission (both in the instant case and generally), reservation clauses allow the parties "to agree to disagree" about certain issues while settling other

[3]The order in Docket No. RP80-61 also rejected a proposed tariff sheet pricing old pipeline production at NGPA rates, and instead accepted and suspended an alternative tariff sheet filed by Consolidated in which the old pipeline production is reflected at cost-of-service pricing. Pet. App. at 29a-30a.

issues. Such clauses reserve the ultimate resolution of a disputed issue by tying its determination to resolution of the same issue in another proceeding or by setting a narrowly focused hearing on the reserved issues in the same docket. *See* Pet. App. 70a-75a (Articles III-VI and VIII reserving rate treatment of issues).

The issue in this case is whether, in the absence of a clause in the RP80-61 settlement reserving Consolidated's claim to collect NGPA rates for its old production, Consolidated may retroactively collect revenues in excess of the agreed settlement rates on grounds that the *Mid-Louisiana* decision, allowing NGPA pricing for old pipeline production, overrides this lack of contractual authority.

In Docket No. RP80-61, contrary to Consolidated's assertion (Pet. at 11), its right to collect NGPA prices for its old pipeline production was an issue from the inception of the case. Consolidated segregated the pricing of its old pipeline production in filing alternate tariff sheets: one reflecting NGPA rates and the other reflecting cost-of-service prices for this production. The Commission rejected the tariff sheet with NGPA pricing, and, instead, required that the tariff sheet with cost-of-service pricing be made effective. Pet. App. at 29a-30a. Consolidated did not seek review of this rejection. Thus, the only effective tariff sheets and rates in Docket No. RP80-61 were based on cost-of-service pricing for old pipeline production, placing the burden upon Consolidated to press for a change if it so desired.

Consolidated, in a separate PGA (purchased gas adjustment) docket, asserted a right to collect NGPA rates retroactively for old production, Pet. App. 22a, more than a year after the settlement agreement in Docket No. RP80-61 was approved by the Commission. Pet. App. 1a. In a subsequent order in this PGA docket, the Commission looked to the settlement agreements covering past periods to judge whether the proposed retroactive collection of NGPA rates was consistent with the settlement terms. Pet. App. 24a-25a.

The Commission determined that the RP80-61 settlement did not allow a retroactive surcharge to collect NGPA rates in lieu of the cost-of-service rates. Retroactive surcharges

were permitted, however, for the periods covered by rate settlements before and after Docket No. RP80-61 where reservation clauses provided for recovery of such additional amounts in the event Consolidated prevailed in *Mid-Louisiana. E.g.* Pet. App. 20a. In short, the Commission's action turned on contractual authority, not on its interpretation of the NGPA. Nor did this action abrogate Consolidated's tariff "rights": the only effective tariff sheet in Docket No. RP80-61 reflected cost-of-service pricing for old pipeline production. Consolidated's PGA proposals to collect NGPA prices retroactively were suspended and made subject to refund pending resolution of the issue. Pet. App. 63a-64a and 24a. Thus the inclusion of a reservation clause in the Docket No. RP80-61 settlement was the only option by which Consolidated could have preserved any right to retroactive recovery.

III. THE NGPA DOES NOT OVERRIDE CONTRACTUAL ARRANGEMENTS

The unstated premise of Consolidated's argument — it should be allowed NGPA rates regardless of the rate settlement, *e.g.* Pet. at 14, — implies that the NGPA overrides contractual and regulatory authority to set rates at other levels. Such an implication is at odds with the NGPA, its legislative history, and judicial interpretation.

The NGPA establishes a series of ceiling prices for various categories of gas through reference to "maximum lawful rates." 15 U.S.C. §§3312-3319. These ceiling prices are not applied, however, in those cases where the contract requires a lower price. Section 101(b)(9) of the NGPA. 15 U.S.C. §3311(b)(9). In such cases, the lower price, not the NGPA rate, is controlling, as clarified in the legislative history:

> "In no case may a seller receive a higher price than his contract permits."

S. Rep. No. 1126, 95th Cong., 2d Sess. 74 (1978).

In discussing the relationship between NGPA authority and contractual authority to set rates, the Fifth Circuit followed

an approach, similar to that in the instant case, of looking to the underlying contract to determine authority for collection of higher rates. The Fifth Circuit found the NGPA followed the contractual authority precepts for rate filings established by the *Mobile-Sierra* doctrine[4]:

> [Section 101(b)(9) of the NGPA] simply codifies the ceiling price corollary made plain in *Mobile-Sierra*. The statute's operation is limited to keeping sales prices from exceeding the ceiling, therefore contractual authority is required to collect permissible rates, and sellers are given no power to avoid the obligation of a fixed price contract. The statute and its legislative history confirm this view.

Pennzoil Co. v. *FERC*, 645 F.2d 360, 374 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). The Fifth Circuit reached the conclusion that the NGPA did not override private contracts:

> "... this Court holds that section 101(b)(9) is Congress' express and specific intent not to preempt the ability of private persons to contractually govern their relationship."

Id. at 375.

An argument similar to Consolidated's claim that the NGPA is overriding was recently addressed by this Court in *Energy Reserves Group* v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983), where the issue was "whether the governmental price esclalator clauses of [specified] contracts were triggered by the enactment of §105 [of the NGPA]." 459 U.S. at 419. The Court found that "as a matter of federal statutory interpretation, the Act does not trigger such clauses automatically."

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[4]The *Mobile-Sierra* doctrine governs the ability of a pipeline to adjust its rates under the Natural Gas Act in the face of "fixed rate" contracts or variants thereof. The doctrine was developed from this Court's opinions in *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and their progeny.

Id. Instead of allowing the higher NGPA price to control, the Court found that the lower price required by the contract was controlling. *Id.* at 420.

The decisions below are consistent with the proper interpretation of the NGPA, which requires referral to the contract to determine the extent of a party's ability to collect NGPA prices. The Commission and the Fourth Circuit found that contractual authority was lacking for the RP80-61 rate period. Absent such authority, the NGPA by itself does not allow recovery of higher rates.

IV. THE SETTLEMENT AGREEMENT DOES NOT RESERVE ANY RIGHT TO COLLECT NGPA PRICES

Consolidated argues that the Commission established "a *new* test to be applied to [an earlier executed] settlement agreement" requiring a specific reservation clause with respect to its claimed right to NGPA pricing "although that right was never an issue in the general rate case." Pet. at 10-11. Consolidated is wrong on both counts.

The Commission did not establish a new, after-the-fact test for judging the settlement agreement simply because its analysis occurred after the agreement was executed. The Commission looked to established precedent regarding the meaning and application of settlement agreements in the context of rate filings. Pet. App. 26a-28a.

Regarding the specific contention that the general reservation clause in the RP80-61 settlement was adequate to reserve Consolidated's purported right to collect NGPA pricing if it prevailed in *Mid-Louisiana*, (Pet. at 11), little needs be said. This was an issue that should have been dealt with specifically in the agreement, Pet. App. 38a n.9; in the words of the Fourth Circuit, "why, if the generalized reservation had the excessively broad scope of meaning now asserted for it by [Consolidated], was it necessary in the RP79-22 settlement agreement [immediately preceding RP80-61] to insert so explicit

a reservation of the NGPA pricing right." Pet. App. 18a. n.22. The decisions below recognize that given the detailed reservations on several other issues in the RP80-61 agreement (Pet. App. at 70a-74a) and the explicit reservations of NGPA pricing in other dockets — all in addition to a general reservation — the only reasonable interpretation is that in RP80-61, Consolidated bargained away this right in return for other concessions:

> "It is a reasonable interpretation device to conclude that what someone has not said, someone has not meant."

Pet. App. at 19a.

V. ANY WAIVER OF A RIGHT WAS DONE KNOWINGLY

Consolidated argues that, because the Commission found the settlement was silent on the NGPA pricing issue, the Fourth Circuit erred as a matter of law by allowing a forfeiture of a "statutory right" by silence. Pet. at 14-16. As previously pointed out the argument is circular since Consolidated's statutory right to collect NGPA ceiling prices is dependent upon retention of contractual right to collect NGPA ceiling rates as part of the RP80-61 settlement agreement. Having drafted the agreement, Consolidated cannot now contend the Commission required it to forfeit a right by refusing to read into the agreement that which is not there.

Totally baffling within this argument is Consolidated assertion that "the Fourth Circuit ignored the Commission's specific finding that the [RP80-61] settlement was silent on the issue of NGPA pricing for old pipeline production." Pet. at 14. Far from ignoring it, the Fourth Circuit expressly contrasted the fact that "the pipeline production issue is not addressed at all in the body of the settlement agreement" with the fact that supporting costs for the settlement rates included cost-of-service pricing for this production. Pet. App. 14a. The court noted that any reservation of this "crucial issue"

should have been made in the body of the agreement. *Id.* The court stated "one searches in vain for the reservation" explicitly or implicitly. *Id.* The Fourth Circuit concluded from this silence that Consolidated "hardly would have entered an agreement intending to reserve the NGPA pricing issue without saying so." Pet. App. at 21a.

Moreover, any waiver was knowing in that the company included in the settlement supporting cost data showing cost-of-service pricing for its production, which followed the Commission's acceptance of the Consolidated alternate tariff sheet showing cost-of-service pricing. Finally, Consolidated was or should have been aware that it had drafted a specific clause reserving this point in the prior (as well as the following) rate settlements.

The cases cited by Consolidated as showing "a position opposite of that taken here" (Pet. at 15) are distinguishable by the fact that the possible waiver involved third parties who were not direct signatories of an agreement, but whose rights could be affected by it. In *Arkansas-Louisiana Gas Co.*, 28 FERC (CCH) ¶61,005 (1984), the Commission noted the differences in possible waiver situations.

> We caution, however, that the foregoing conclusion depends upon a knowledgeable waiver of Title IV rights. Such a waiver is obvious in a direct sale situation. We would not necessarily reach the same conclusion if presented with a similar proposal but involving distributors where knowledgeable waivers from ultimate end-users may not be obtainable.

Id. at p. 61,009. It is not difficult to see why the Commission refused to find that end-users had waived their rights in the latter situation. In the instant case Consolidated was the only party seeking a rate increase, and it was knowledgeable about its filing and settlement.[5]

[5]The other gas cited by Consolidated, *Columbia Gas Transmission Corp.* v. *Tennessee Gas Pipeline Co.*, 29 FERC (CCH) ¶61,203 (1984), Pet. at 16, merely stands for the proposition that the silence of a settlement agreement with respect to a pipeline's customers' right to challenge subsequent rate increase filings as imprudent did not extinguish the customers' statutory rights to challenge pipeline rate filings. *Id.* at p. 61,408. Because such challenges constitute the fundamental protection of the Natural Gas Act, a waiver of such right must be clearly identified. In contrast, the right of a pipeline to collect rates in excess of the agreed settlement level based upon resolution of a disputed issue was in the normal course a matter of express reservation in the settlement agreement.

CONCLUSION

Consolidated's petition presents no special and important reason for issuing the writ. The case involves a narrow issue applying to only one in a series of similar rate settlements; it is consistent with the NGPA which requires that the contract price control; and, it is consistent with well-established principles of contract law.

WHEREFORE, New York submits that the petition must be denied.

Respectfully submitted,

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